

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division
Honolulu, Hawaii 96813

May 8, 2009

Board of Land and Natural Resources
State of Hawaii
Honolulu, Hawaii

Hawaii

Forfeiture of General Lease No. S-4138, Merlin Keaulana-Dyball and Moana Keaulana-Dyball, Lessee, Waiakea, South Hilo, Hawaii, Tax Map Key:3rd/2-4-49:25.

PURPOSE:

Forfeiture of General Lease No. S-4138, Merlin Keaulana-Dyball and Moana Keaulana-Dyball, Lessee.

LEGAL REFERENCE:

Section 171-39, Hawaii Revised Statutes, as amended.

LOCATION:

Portion of Government lands of Panaewa Farm Lots situated at Waiakea, South Hilo, Hawaii, identified by Tax Map Key: 3rd/2-4-49:25, as shown on the attached map labeled Exhibit A.

AREA:

10.008 acres, more or less.

TRUST LAND STATUS:

Section 5(b) lands of the Hawaii Admission Act

DHHL 30% entitlement lands pursuant to the Hawaii State Constitution: NO

CHARACTER OF USE:

Agriculture/residential purposes.

TERM OF LEASE:

55 years, commencing on 1/12/1968 and expiring on 1/11/2023.

ANNUAL RENTAL:

\$4,500.00 due in quarterly payments of \$1,125.00.

REMARKS:

Pursuant to the authority granted the Chairperson by the Board of Land and Natural Resources at its meeting of January 11, 1980 and the breach provision contained in General Lease S-4138, Merlin Keaulana-Dyball and Moana Keaulana-Dyball, Lessee, was served a Notice of Default by certified mail dated January 30, 2009 for:

- ☒ Failure to keep lease rental payments current
- ☐ Failure to post required performance bond
- ☐ Failure to post required fire insurance policy
- ☐ Failure to post required liability insurance policy

Said notice, accepted by the Lessee on January 31, 2009, offered the Lessee a sixty-day cure period to correct the default. This cure period expired on April 1, 2009. **Payment was received on April 9, 2009, one week after the cure period expired.**

Lessee was also served a Notice of Default by certified mail dated February 11, 2009 for:

- ☐ Failure to keep lease rental payments current
- ☐ Failure to post required performance bond
- ☐ Failure to post required fire insurance policy
- ☐ Failure to post required liability insurance policy

- ☒ Other: Unauthorized use of Lease Lands Including the Storage and Operation of a Vehicle Repair Facility.

Said notice, accepted by the Lessee on February 13, 2009, offered the Lessee a sixty-day cure period to correct the default. This cure period expired on April 13, 2009. As of April 21, 2009, this breach has not been cured.

As of April 21, 2009, the current status of all lease compliance items is as follows:

RENT: The Lessee has a rental delinquency of \$1,125.00 for the time period from 04/12/09 to 07/11/09.

INSURANCE: The Lessee has posted the required liability insurance policy.

PERFORMANCE BOND:

The Lessee has posted the required performance bond.
Current bond is in the amount of \$9,000.00.

CONSERVATION PLAN:

The Lessee has submitted a current conservation plan.

OTHER:

Lessee has not cured the breach of lease agreement for unauthorized use of lease lands including the storage and operation of a vehicle repair facility.

BACKGROUND:

The Lessee has been served notice of defaults on twelve (12) previous occasions including failure to keep lease rent current on seven (7) occurrences. At its meeting of February 10, 2006, under agenda item D-6, the Board of Land and Natural Resources approved as amended, the forfeiture of GL S-4138 for rent and insurance. The amendment allowed the Lessee thirty (30) days to cure the deficiencies. At the meeting, the Lessee indicated that a certified check was mailed and that they were working on getting their liability insurance. Both defaults were cured by March 3, 2006 and the forfeiture was rescinded.

The Lessee was served notice of default for rent and was put on the Board agenda for its July 11, 2008 meeting (Item D-2) for cancellation. However, a few days before the meeting, Mr. Keaulana-Dyball called Land Division staff and advised staff that Mr. Keaulana-Dyball was on the mainland and would not be back in Hawaii by the July 11, 2008 meeting. This matter was therefore deferred for later disposition.

The Land Board at its meeting of August 8, 2008 (item D-3) again deferred when the Lessee questioned the lease rent and the impending transfer of agricultural lands from the DLNR to the Department of Agriculture (DOA). The Board had requested staff to provide an update on the status of the land transfer.

A review of the initial list of agriculture lands to be transferred to the DOA did not include the subject lease. In addition, the Lessee was notified by letter dated July 24, 2007 of the rental increase as per the rental renewal policy in the lease. The Lessee was

given a 30-day period in which to respond to this letter either accepting or not accepting the rent increase. A subsequent letter was sent on September 4, 2007 notifying the Lessee that since no response was received by the deadline, the fiscal office was instructed to change the rent accordingly.

As a result, the Lessee was brought back to the Board again, for cancellation as a result of failure to keep lease rent current and post the required performance bond on August 22, 2008 (agenda item D9), and again, the Board amended the forfeiture allowing the Lessee thirty (30) days to cure the defaults. On August 22, 2008 proof of performance bond requirement was provided to the Land Division office on O'ahu. On August 27, 2008, the DLNR fiscal office received payment for the delinquent rent.

An inspection of the property in June 2004, revealed little development of the property. No improvements have been made to any of the existing structures. A house on the property had burned down and no effort was made to rebuild it. There was no property insurance for the house as it was of substandard construction and built without the necessary county building permits. There appears to be a makeshift living area in the former packing shed. Blue tarps separate storage from living areas (photo's, exhibit B). Although the lease allows for residential use, any housing structure must be approved by the Chairperson and conform to county codes and permits.

Another inspection of the property on February 11, 2009 revealed little agricultural activity although there appeared to be some recent land clearing. Upon closer inspection, staff discovered what appeared to be an automobile salvage and repair facility on the property with over 20 assorted vehicles stored in the back section of the lease land (photo's, exhibit C). A notice of default was issued on February 13, 2009 and the Lessee was given sixty (60) days to clear the property of all vehicles and accessory equipment pertaining to the salvage operation. A follow-up inspection was conducted on April 15, 2009. This most recent inspection showed no improvement and/or effort in correcting the default (photo's, exhibit D).

As of April 20, 2009, the outstanding defaults specified above have not been cured. Although the Lessee made rent payment for the first quarter, it was received after the cure period. Paragraph 7, page 14 of the lease states in part;

"Acceptance of rent not a waiver. That the acceptance of rent by the Lessor shall not be deemed a waiver of any breach by the Lessee of any term, covenant or condition of the lease."

Furthermore, the Lessee is currently in arrears with the rent for the quarterly period of April 12, 2009 through July 11, 2009.

As a result of a lack of agricultural activity in addition to the defaults for rent, unauthorized housing and unauthorized vehicle salvage operation, and because this is the third time the Lessee has been brought to the Board for cancellation of lease, staff is recommending that the Board cancel General Lease No. S-4138 without reprieve.

RECOMMENDATION: That the Board:

1. Authorize the cancellation of General Lease No. S-4138 in the manner specified by law;
2. Authorize the retention of all sums heretofore paid or pledged under General Lease No. S-4138 as liquidated damages;
3. Terminate the lease and all rights of Lessee and all obligations of the Lessor effective as of May 8, 2009, provided that any and all obligations of the Lessee which have accrued up to said effective date or which are stated in the lease to survive termination shall endure past such termination date until duly fulfilled, and further provided that Lessor reserves all other rights and claims allowed by law; and
4. Authorize the Department of the Attorney General, the Department of Land and Natural Resources, or their agents to collect all monies due the State of Hawaii under General Lease No. S-4138 and to pursue all other rights and remedies as appropriate.

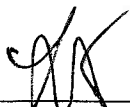
Respectfully Submitted,



Gordon C. Heit
Land Agent



APPROVED FOR SUBMITTAL:



Laura H. Thielen, Chairperson



TMK: 3rd/2-4-49:25

N U E

Access Permitted

Sec. of Vol.

R E S E R V E

April 11, 1917

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(Larry Komata)
-le.
G.L. S-4334

(Hale Nui
Flowers, Inc.) Le
G.L. S-4138

(Harold T. Tanouye Jr.) le
G.L. S-4445
(Makai Nursery) Sub-le

10.23 Acres.

24

410.00 70.71

25

10.00 Acres.

26

5.708 Ac.

27

7.182 Ac.

28

13.450 Ac.

(Harold T. Tanouye Jr.) le
G.L. S-4445

(Harold T. Tanouye Jr.) le
(Vantage Partners)
-Sub le

KAHIKA STREET

Huanani

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ZONE 1

SEC.

SUBJECT PROPERTY

